

90-1012

Supreme Court, U.S.

FILED

DEC 4 1990

JOSEPH F. SPANIOL, JR.
CLERK

NUMBER _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1990

ISABELLE M. WOODS, PETITIONER

VERSUS

ANTHONY M. FRANK, POSTMASTER GENERAL
U.S. POSTAL SERVICE, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JIMMY D. MCDOUGLE
Counsel of Record
P.O. Box 14452
Monroe, LA 71207
Telephone (318) 345-1886

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

Whether the Honorable Trial Judge committed reversible error in granting the defendant's Motion for Summary Judgment on the grounds that Plaintiff was not entitled to any remedy, thus the case was moot, and she had failed to show a prima facie case of discrimination.

LIST OF PARTIES

The parties are named in the caption of this case. There is no parent or subsidiary listing required to plaintiff's knowledge.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	1
OPINIONS BELOW	2
JURISDICTION	3
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING WRIT	10
APPENDIX A	16
RULE 56(c) - F.R.C.P.	16
28 U.S.C. §1343(a)(4)	16
OPINION OF HON. EDWIN HUNTER, JR.	17
JUDGMENT OF 1/23/90	28
JUDGMENT OF 4/12/90	28
8/8/90 OPINION OF 5TH CIRCUIT	29
9/6/90 REHEARING DENIAL	39



TABLE OF CASES

	PAGE
Aquamina v. Eastern Airlines 644 F.2d 506 (5th Cir. 1981)	10
Baker v. Kaiser Aluminum and Chemical Corporation 608 F.Supp. 1315 (D.C. Cal. 1984)	11
Federal Savings and Loan Insurance Corporation v. Williams 599 F.Supp. 1184 (D.C. Md. 1984)	10
Hayden v. First National Bank of Mt. Pleasant, Texas 595 F.2d 994 (5th Cir. 1979)	10
Warren v. Quality Care Service Corporation 603 F.Supp 1174 (D.C. NY 1985)	11

NUMBER _____

IN THE SUPREME COURT

OF THE UNITED STATES

October Term. 1990

ISABELLE M. WOODS, PETITIONER

VERSUS

ANTHONY FRANK, RESPONDENT

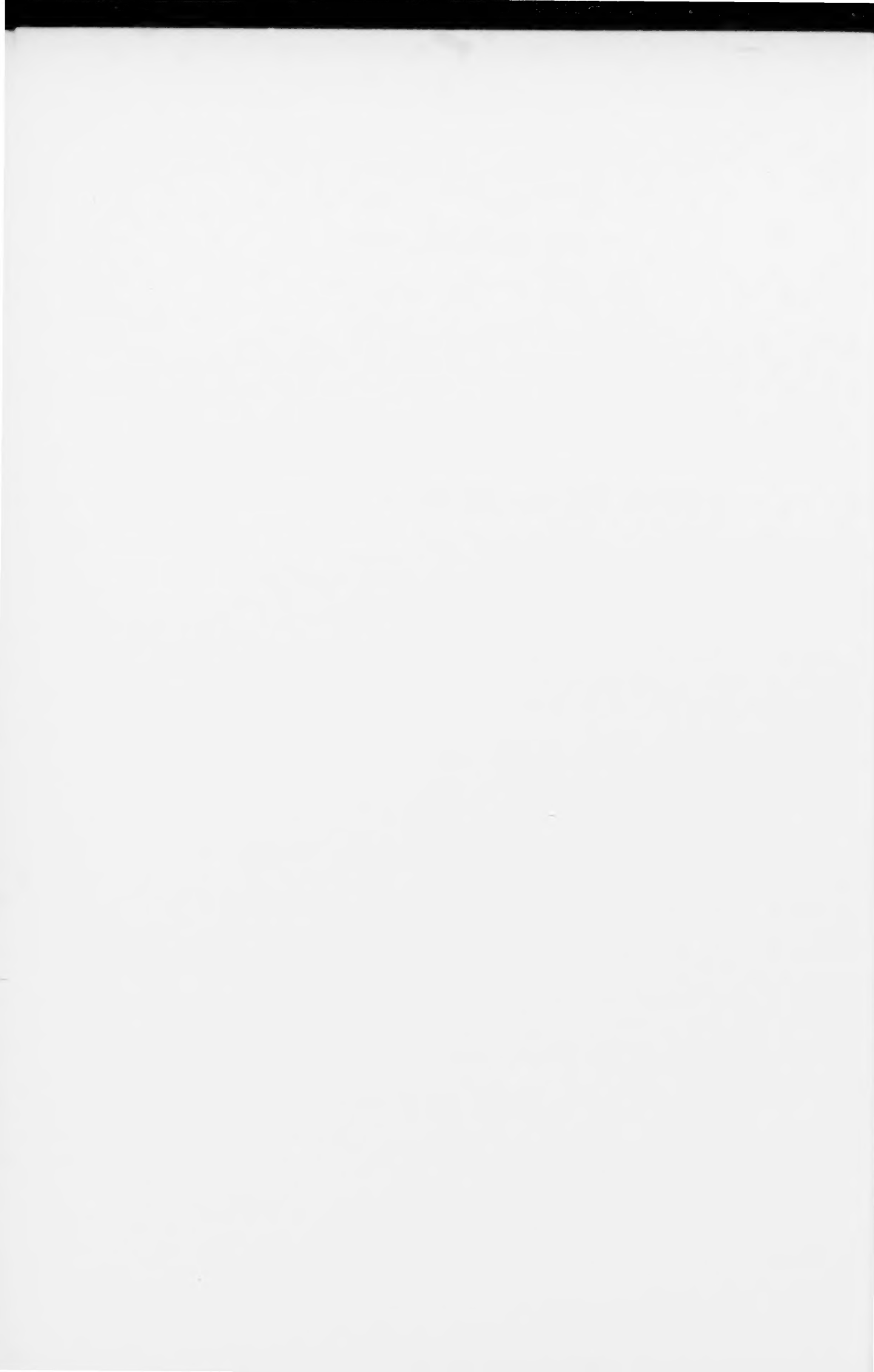
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

The Petitioner, ISABELLE M. WOODS, prays
that a writ of certiorari issue to review the
judgment of the United States Court of Appeals
for the Fifth Circuit entered in the above
entitled case on September 6, 1990.

QUESTIONS PRESENTED

Whether the Honorable Trial Judge
committed reversible error in granting the
defendant's Motion for Summary Judgment on the
grounds that Plaintiff was not entitled to any



remedy, thus the case was moot, and she had failed to show a prima facie case of discrimination.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Louisiana, Honorable Edwin Hunter, Jr., Judge, entitled "Memorandum Ruling" is unreported and is printed in Appendix A hereto, *infra*, page 17. The opinion and judgment of the United States Court of Appeals for the Fifth Circuit in this matter, entered on August 8, 1990, is unreported and is printed in Appendix A hereto, *infra*, page 29. The certified copy of the judgment of the Fifth Circuit was issued as and for the mandate of the Court as reflected by the notice from the Clerk of the United States Court of Appeals for the Fifth Circuit. A copy of that notice is also included in Appendix A, page 28. The denial of petitioner's request for rehearing by the Fifth Circuit is also included, dated September 6, 1990, on page 39 of Appendix A.



JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 8, 1990. Rehearing was denied on September 6, 1990. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254. Original jurisdiction in the District Court was grounded under 28 U.S.C. Sec. 1343(a)(4).

STATUTES INVOLVED

The statutes involved herein are listed in Appendix A herein and are as follows: 28 U.S.C. Sec. 1343 (a)(4), and Rule 56 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Plaintiff's complaint was filed on April 14, 1989, in the Western District of Louisiana, United States District Court. Original jurisdiction was grounded under 28 U.S.C. 1343(a)(4). A Motion for Summary Judgment was filed by Defendant on December 15, 1989, alleging that pursuant to Rule 56 of the Federal Rules of Civil Procedure, there was no genuine issue as to any material fact.



position.

As of May 10, 1986, Smith was a Commercial Accounts Representative. He received (voluntary, Complainant and Smith testified) successive reassignments from Commercial Accounts Representative (Customer Services Representative) to Supervisor of Delivery and Collections effective June 7, 1986 (PS Form 50) and to Superintendent of Station and Branch Operations A on July 19, 1986.

Further evidence indicates that G.B. DeDual, SC Director of Customer Services in the Agency and Complainant's immediate supervisor, informed Complainant of her permanent lateral transfer, technically and officially a reassignment, to a vacant position of Manager of the Cedar Grove Station, an associate office, effective a week from July 11, 1986. That reassignment was officially reflected to be Manager of Station and Branch Operations B on PS Form 50, which is a notification of personnel action.



The following recital of factual background is taken from the bench decision ruling of Judge Antonio Carbonell, Administrative Law Judge for the Equal Employment Opportunity Commission, who rendered a decision on June 8, 1988, in favor of petitioner after taking evidence and hearing testimony in this matter:

"The record shows that Complainant (petitioner) was the Agency Manager of Retail Sales and Services, level 18, in the United States Postal Service, Shreveport MSC. She had filled it by promotion and performed it proficiently from November 12, 1983 until the reassignment action. While performing the duties of said position, she had the opportunity to assign and direct Michael C. Smith (comparison Number 3 in the complaint file)(Caucasian, male, Anglo-American) to perform duties in several different positions Smith had worked in 1985 and 1986, including detail assignments to Complainant's own



According to pertinent documentary evidence and testimony thereto, there was an exchange of verbal and written communications between Complainant, who objected to the reassignment, and those officials to whom she made known her dissatisfaction. They were: George DeDual, SCD Director of Customer Services, D. T. Bailey, Jr., Division General Manager/Postmaster (Jackson, Mississippi) and John W. Poole, SC Manager/Postmaster. Complainant did not succeed in stopping DeDual's directive. Finally, DeDual confirmed to Complainant on July 17, 1986, his reassignment decision. Complainant took the reassignment at the same level 18 she was in after the Agency did not accept her wishes to remain placed in the retail (customer) function to fulfill, as she indicated, her career goals. The Agency had a totally different plan for her as the Manager of the Cedar Grove Station.



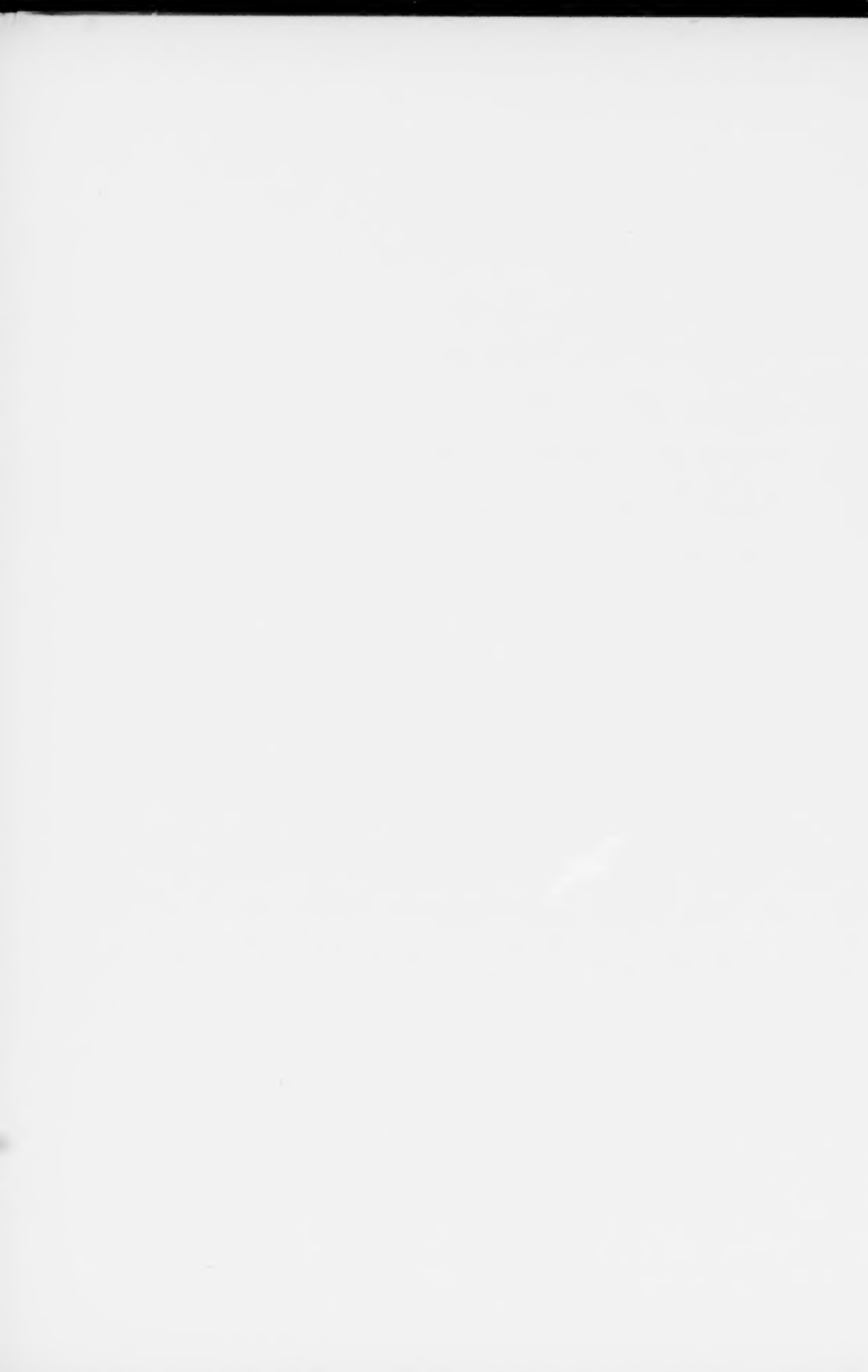
Coincidentally and about the same time of that personnel action, DeDual left the office for a three-week period and placed Smith, beginning on July 21, 1986 (according to DeDual's memorandum dated July 18, 1986) to assume on detail (temporary assignment) the duties and functions of the Manager of Retail Sales and Services, formerly performed by Complainant until July 18, 1986. By that memorandum dated July 18, 1986, DeDual also detailed Supervisor Hewitt to Acting SC Director of Customer Services and someone named F. Lawrence to Acting Manager of Delivery and Collection. The evidence showed that on a certain occasion Complainant had been detailed by DeDual, for a short period, in (DeDual) position.

Moreover, in DeDual's memorandum of July 11, 1986 he had detailed, in addition to Smith to Manager of Retail Sales and Services, Frank Ford to General



Supervisor of Delivery and Collection. On the other hand, Phil Baker appeared reassigned as Supervisor of Mails and Delivery to a postal service station on July 11, 1986. There is corroborative documentation that DeDual's assignment orders (PS Form 1723) to Smith were specific details to the Manger of Retail Sales and Service position. Those assignment orders by DeDual were for Smith to fill the vacancy created because of Complainant's reassignment and those details were for the periods 8/16/86 - 8/29/86 and 8/30/86 - 9/12/86. On the other hand, Smith further testified that he was detailed to Complainant's position in July 1986, although, he said, he did not ask for it, and that he was never involuntarily reassigned by DeDual on three occasions.

Complainant claims that she was permanently deprived of her former position in order to create a vacancy and promote Smith into her former job later.



At the time that the instant controversy originated, Smith, at 15 grade level, occupied through reassignment (as noted before) the Superintendent of Station and Branch Operations A position title, since July 19, 1986. Subsequently, he was detailed to Manager of Retail Sales and Services on July 19, 1986. This move had been decided by the Agency on July 11, 1986, as documentary evidence shows. Although promotion is not the issue at stake, the record shows that Smith's promotion was announced on September 8, 1986 by Postmaster Poole effective September 27, 1986. The vacancy announcement closing date was August 13, 1986. Smith had been detailed to the Manager of Retail Sales and Services job since July 21 to the position vacated due to the alleged discriminatory action."



REASONS FOR GRANTING WRIT

The issuance of a writ of certiorari in this case is warranted because the Honorable Trial Judge and Appellate Court have decided a federal question in a way that conflicts with applicable decisions of this Court and that of the Federal Court of Appeals.

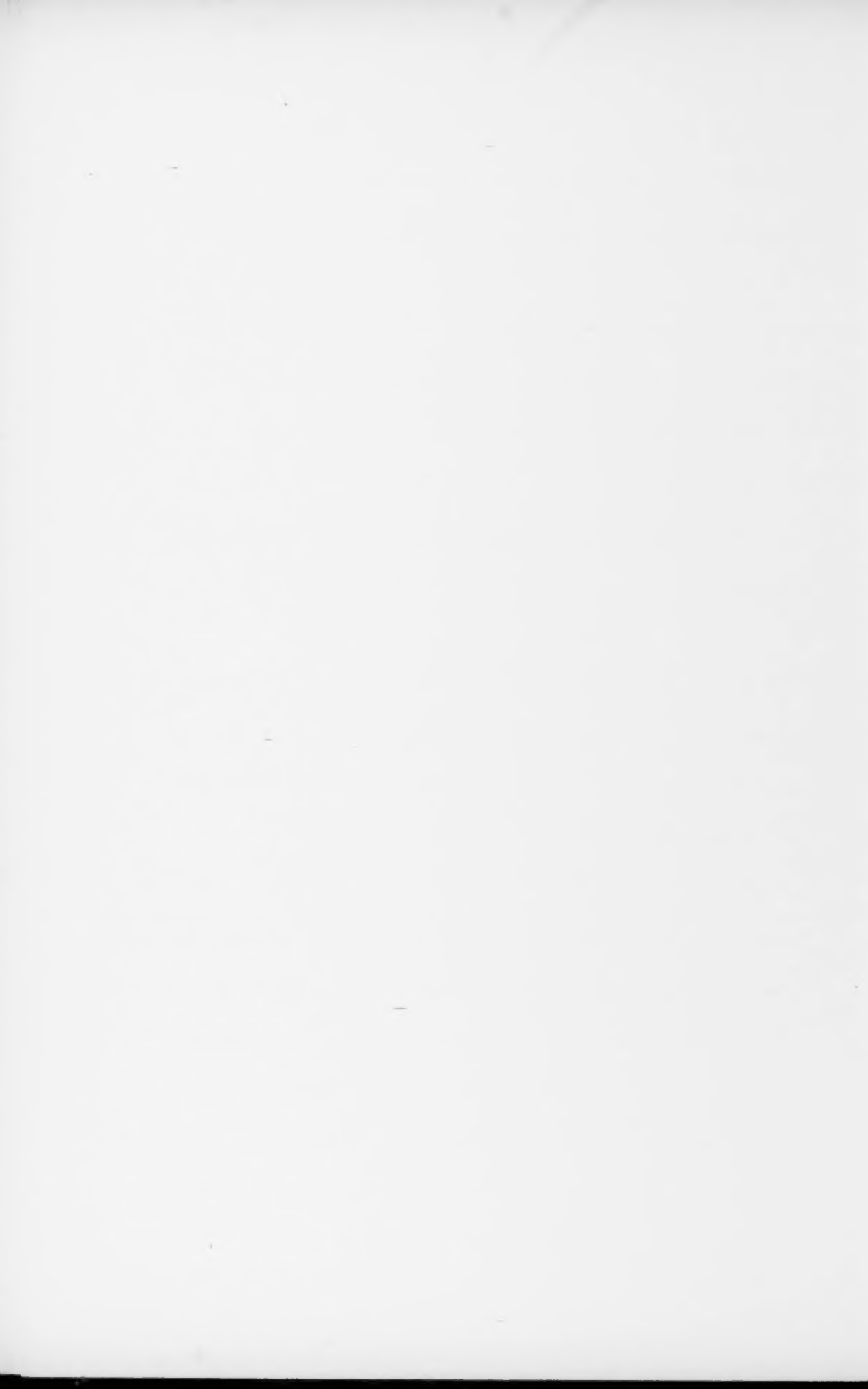
Specifically, the lower courts have ignored the established jurisprudence that compells the disposition of an employment discrimination case by summary judgment to be done in a cautious manner.

Aquamina V. Eastern Airlines, 644 F.2d 506 (5th Cir. 1981), Hayden v. First National Bank of Mt. Pleasant, Texas, 595 F.2d 994, (5th Cir. 1979). Summary Judgment is inappropriate merely because a mover appears more likely to prevail at trial, and may be granted only when mover is entitled to relief beyond all doubt. Federal Savings and Loan Insurance Corporation v. Williams, 599 F.Supp. 1184 (D. C. Md. 1984). Further a court must be particularly cautious in deciding in

whether to grant Summary Judgment where issues of intent or motivation are involved. Baker v. Kaiser Aluminum and Chemical Corporation, 608 F.Supp. 1315 (D.C. Cal. 1984). Finally, Summary Judgment must be granted with great caution in employment discrimination cases, since questions of discriminatory intent are often impossible to resolve in advance of trial. Warren v. Quality Care Service Corporation, 603 F.Supp. 1174 (D.C. N.Y. 1985).

The pertinent section of Judge Carbonell's ruling is produced below which clearly shows that this is not a matter suitable for summary judgment:

"Smith's testimony disclosed that he was told by DeDual that he was going to reassign Complainant and to detail him to Complainant's prospective vacant position. However, he said DeDual did not give him a reason. There is no dispute to the fact that Complainant, who was Smith's supervisor at some point, had



detailed him into her Retail Sales and Services job in the past and to other positions in order to offer him a variety of experience.

Smith's testimony contradicted DeDual's statement that Smith had been reassigned involuntarily to other positions. Simply, DeDual's statement is not true, I must find." (Page 15 - 16)

"It is difficult and almost impossible to determine that the testimony offered by DeDual could be taken at face value in the absence of written evidence thereto. On the other hand, in many of the cases testified to by DeDual, it appears to me that the reassigned individuals were moved from a functional area (delivery) to an equalized job (delivery). It was the opposite to what happened to complainant, who was radically changed from a managerial function of one type to a completely different one, despite her good or very good appraisals gotten by

her since the date (11/12/83) when she was promoted to Manager of Retail Sales and Services, and in the absence of deficiencies advanced by the Agency for the sudden and incomprehensible reassignment. It seems that, in the context of the testimony offered, Smith was aware of Complainant's reassignment before the Agency had communicated to her the prospective employment action. **This fact makes highly suspicious what looks like a good-Samaritan reassignment idea advanced by the Agency.**" (Page 16 - 17)

"The legitimate, nondiscriminatory motives raised by the Agency, articulating its explanation for the reassignment of Complainant, are found by this Administrative Judge to constitute pretext to mask unlawful discrimination. Not only a preponderance of the evidence has shown us to be so, but the testimony offered on behalf of the Agency, which is found not credible." (Page 19)



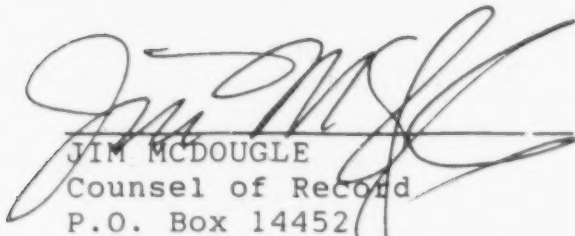
The foregoing clearly illustrates that the only judge to hear evidence in this matter found by a preponderance of the evidence that discrimination had occurred, and the defendant's evidence was not credible. With such a finding in this case's history, it is inconceivable how a motion for summary judgment could be in part based on the notion that no prima facie case of discrimination has been shown.

Further, the ruling that there is no remedy available to petitioner is likewise inconceivable. Title VII permits injunctions to prohibit unlawful employment practices, and any other equitable relief deemed appropriate. In essence, there is no limit on remedies in terms of equitable relief. How this case can be disposed of by summary judgment is simply incomprehensible and a affront to this courts' tradition of defending civil rights.

CONCLUSION

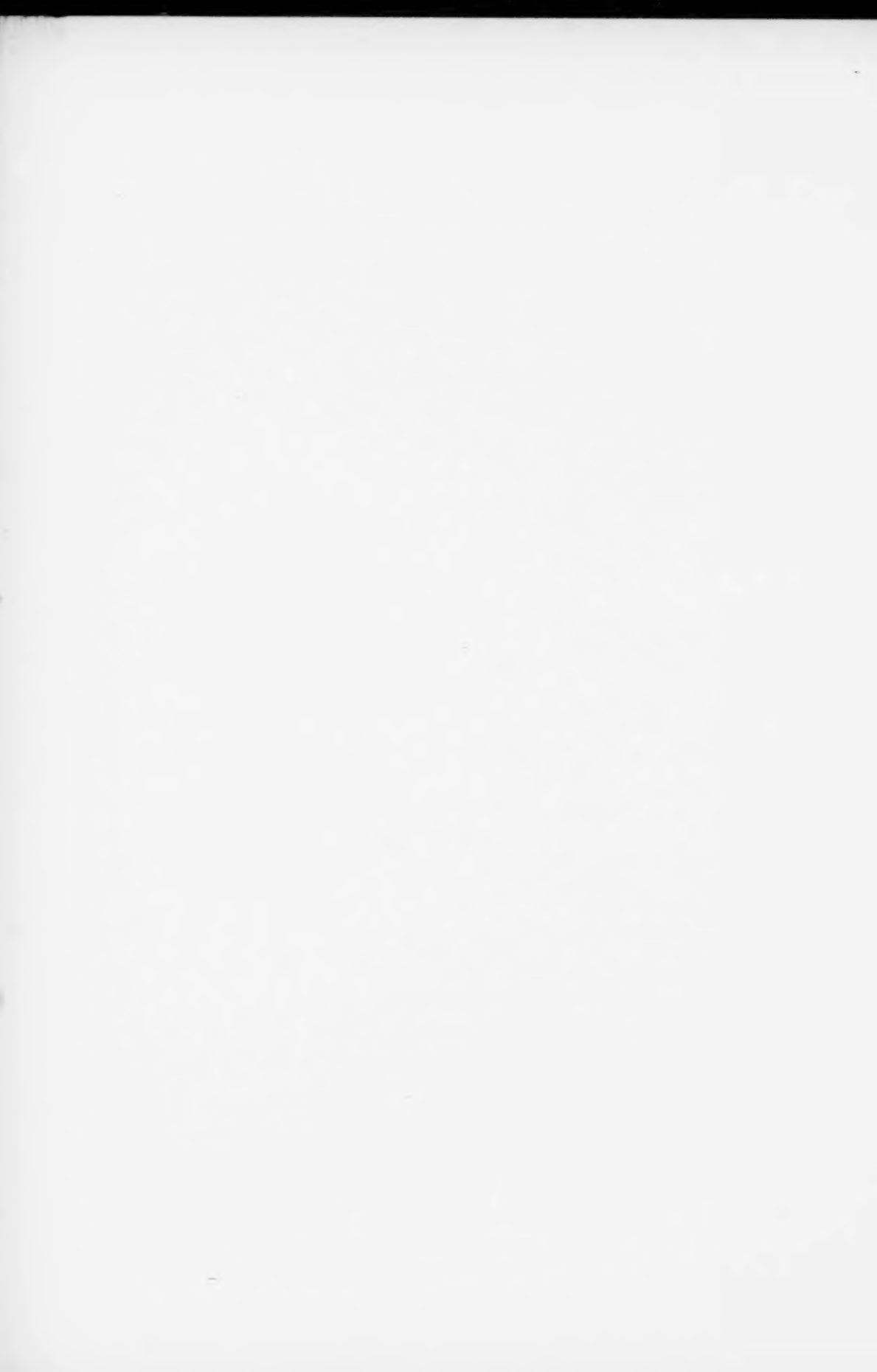
For the foregoing reasons, this petition for Writ of Certiorari should be granted, and this case reviewed by this Honorable Court.



A large, stylized handwritten signature in dark ink, likely belonging to Jim McDougale, is written over the printed name and address.

JIM MCDOUGLE
Counsel of Record
P.O. Box 14452
Monroe, LA 71207
Telephone (318) 345-1886

ATTORNEY FOR PETITIONER



APPENDIX A

Rule 56(c) - Fed. Rules of Civil Procedure

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

28 U.S.C. Sec. 1343(a)(4)

(a) The district courts shall have original jurisdiction of any civil action



authorized by law to be commenced by any person:

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. Sec. 2000e-5(e)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

ISABELLE M. WOODS

No. 89-0859

VERSUS

ANTHONY M. FRANK

JUDGE HUNTER

MEMORANDUM RULING IN RE DEFENDANT'S

MOTION FOR SUMMARY JUDGMENT

Plaintiff, a black female of Puerto Rican national origin, alleges that she was laterally reassigned within the Shreveport, Louisiana Post Office from the position of Manager, Retail Sales and Services to the position of Manager, Station and Branch Operations for the Cedar Grove Station on



account of her race, sex, and national origin. Alleging that a cause of action lies and that jurisdiction exists pursuant to 42 U.S.C. § 2000e et seq., she seeks transfer back to her original position, retractive award of lost wages and benefits, costs, and attorney's fees. Defendant has filed a motion for summary judgment with supporting brief and evidentiary material and plaintiff has responded. Oral arguments have been presented by counsel.

On July 18, 1986 Isabelle M. Woods, at the option of her superior, George DeDual, and without her request, was reassigned within the Shreveport, Louisiana Management Sectional Center (MSC) from the position of Manager, Retail Sales and Services, level 18, to the position of Manager, Station and Branch Operations at the Cedar Grove Station. Such directed reassignments at management's option are expressly contemplated by § 353.2 of the Postal



Service Employee and Labor Relations Manual. Pursuant to the very nature of reassignment, which by definition involve positions of the same or equivalent grade, Woods retained her grade (level 18), her step-within-grade (Step 9), her salary (then \$39,803 per annum), and all other employment benefits, when she was reassigned.

On January 30, 1988, pursuant to a nationwide directive of the Deputy Postmaster General, a general restructuring of all postal management sectional centers was uniformly implemented. This realignment resulted in the abolishment of the position of Manager, Retail Sales and Services at the Shreveport MSC and all other equivalent level MSC's. As of that date, the position from which Woods had been reassigned and to which Smith had been promoted ceased to exist.

As part of the MSC reorganization, a new and distinct position, MSC Director,



Marketing (Level 21) was created. Woods and Smith and many others applied for this new position. A Promotion Review Committee, upon which George DeDual did not serve, selected both Woods and Smith among others for interview. After interviewing the candidates, the Review Committee recommended to the selecting official a list of three candidates felt by the committee to be the best qualified. This list included Smith but did not include plaintiff. The selecting officials originally chose Douglas E. Ruth from the list of recommendees to fill the position; but because Ruth had accepted a different job by the time of his selection, the selecting official sought and was allowed to substitute Smith as the selectee. Woods never filed an administrative E.E.O. complaint regarding her non-selection for the MSC Director, Marketing position. However, in June of 1982, she did file a complaint when she was not selected and

promoted to the position of Supervisor of Quality Control, EAS-19, in the United States Postal Service, Shreveport, Louisiana. This complaint is not at issue here, but we note that there the EEO fact finders concluded that she had not been recommended for that position because she "exhibited a pronounced attitude of hostility or anger during the interview." She had originally claimed "gender discrimination," but withdrew that claim when another lady received the EAS-19 position.

Here, Woods filed a formal EEO administrative complaint alleging that her reassignment in 1986 was motivated by consideration of her race, sex, and national origin. The processing of this complaint, which included an administrative hearing, culminated in the March 16, 1989 decision of the Office of Review and Appeals of the Equal Employment Opportunity Commission (EEOC) which rejected Woods'



claim of discrimination. (A copy of the decision, which is self-authenticating pursuant to Federal Rule of Evidence 902(1), was submitted and appears in the record) The EEOC specifically noted that the 1986 promotion of Michael C. Smith to the Retail Sales Manager position from which Woods had been reassigned "is not at issue herein." We agree.

Is the Plaintiff's Case Moot?

Federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them. North Carolina v. Rice, 404 U.S. 244, 246 (1971); Bumpus v. Clark, 702 F.2d 826, 827 (9th Cir. 1983).

In the instant case, plaintiff seeks as relief (paragraph 14.1 of the complaint):

Re-assignment [sic] to her previous position of manager of retail sales and services, with retroactive award of any step increase, cost of living



raises and fringe benefits which have been lost to complainant because of said involuntary transfer.

When plaintiff was reassigned, her salary, fringe benefits, grade and step-within-grade all remained the same. She suffered no monetary or related type loss at all. There is nothing for the Court to remedy in this regard. The job to which plaintiff desires to be returned no longer exists. It was abolished not only at the Shreveport MSC, but throughout the country as part of a general MSC realignment directed by the highest echelon of postal management. In short, even if there had been a discriminatory motive behind plaintiff's reassignment, she still suffered no loss of station, salary, or fringe benefits. Because of independent, intervening causes she cannot occupy the position from which she was moved.

To restate the facts, Woods (in 1988) indeed applied for the "Directorship" but



was not recommended by the Promotion Review Committee as one of the three best qualified candidates despite her earlier tenure as Manager, Retail Sales and Services. It would be rank speculation to find that absent her reassignment plaintiff would have been recommended by the Promotion Review Committee on which sat three individuals uninvolved with plaintiff's earlier reassignment - or, even if recommended, that she would have been the choice of the selecting official. See Gilbert v. City of Little Rock, Arkansas, 867 F.2d 1063, 1066 (8th Cir. 1989), in which the court rejected plaintiff's contention that because of discrimination in his promotion to sergeant, he should have been awarded further backpay for a period of delay in his promotion to lieutenant. ("Backpay is available to remedy discrimination in a promotional system, however, only where the employee would have been promoted absent

discrimination. Because backpay is an equitable remedy, there must be some certainty that the promotion would have occurred absent discrimination... An award of backpay cannot be made on ... a speculative basis.")

We reiterate that when plaintiff was not promoted to the marketing position in 1988, she did not file an EEO complaint respecting that matter. Properly understood, her intimations regarding that position are an effort to bypass the well established law of the Fifth Circuit that the exhaustion of federal section Title VII administrative remedies under 42 U.S.C. § 200e-16 are "an absolute prerequisite to suit under that section." Porter v. Adams, 639 F.2d 273 (5th Cir. 1981). Plaintiff may not graft onto the subject matter of this action administratively unprosecuted and now waived claims of discrimination regarding the 1988 marketing promotion.

Here, as in Bohen, 799 F.2d 1180 (7th



Cir. 1986) where backpay, transfer, and other sources of compensation damages are not available, the defendant must prevail. Nominal damages are not available as equitable relief. See Swanson, 882 F.2d 1235 (7th Cir. 1989).

In our opinion, plaintiff has been unable on this record to present a material issue of fact to establish a prima facie case of racial, sex, or national origin discrimination. The agency relates that Ms. Woods was reassigned to give her desirable experience and to best serve the needs of the agency. They thought delivery experience would be very useful. Moreover, the Cedar Grove station needed a permanent manager and Woods could give leadership to that position. Then, too, the record reveals that the agency set forth legitimate nondiscriminatory reasons for its action. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981).



We are confronted with a rather unique set of circumstances. We understood counsel to have stated during oral argument that the next vacancy in a Postmaster's position in the Shreveport division was hers for the asking. Summary judgment is appropriate. Defendant's motion is granted.¹

THUS DONE AND SIGNED in chambers at Lake Charles, Louisiana on this 16th day of January, 1990.²

S/Judge Edwin F. Hunter, Jr.

FOOTNOTES:

1. We note three distinct reasons:

- a) Plaintiff's case is moot;
- b) A prima facie case of discrimination is highly speculative;
- c) The agency set forth legitimate non-discriminatory reasons for its action.

2. Counsel for the Postmaster General is to submit appropriate judgment.



UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

ISABELLE M. WOODS

No. 89-0859

VERSUS

ANTHONY M. FRANK

JUDGE HUNTER

J U D G M E N T

For the reasons assigned in the Court's memorandum ruling dated and filed January 16, 1990,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant's Motion for Summary Judgment is GRANTED and that the plaintiff's complaint is dismissed with prejudice at her costs.

THUS DONE AND SIGNED in Lake Charles, Louisiana, this 23 day of January, 1990.

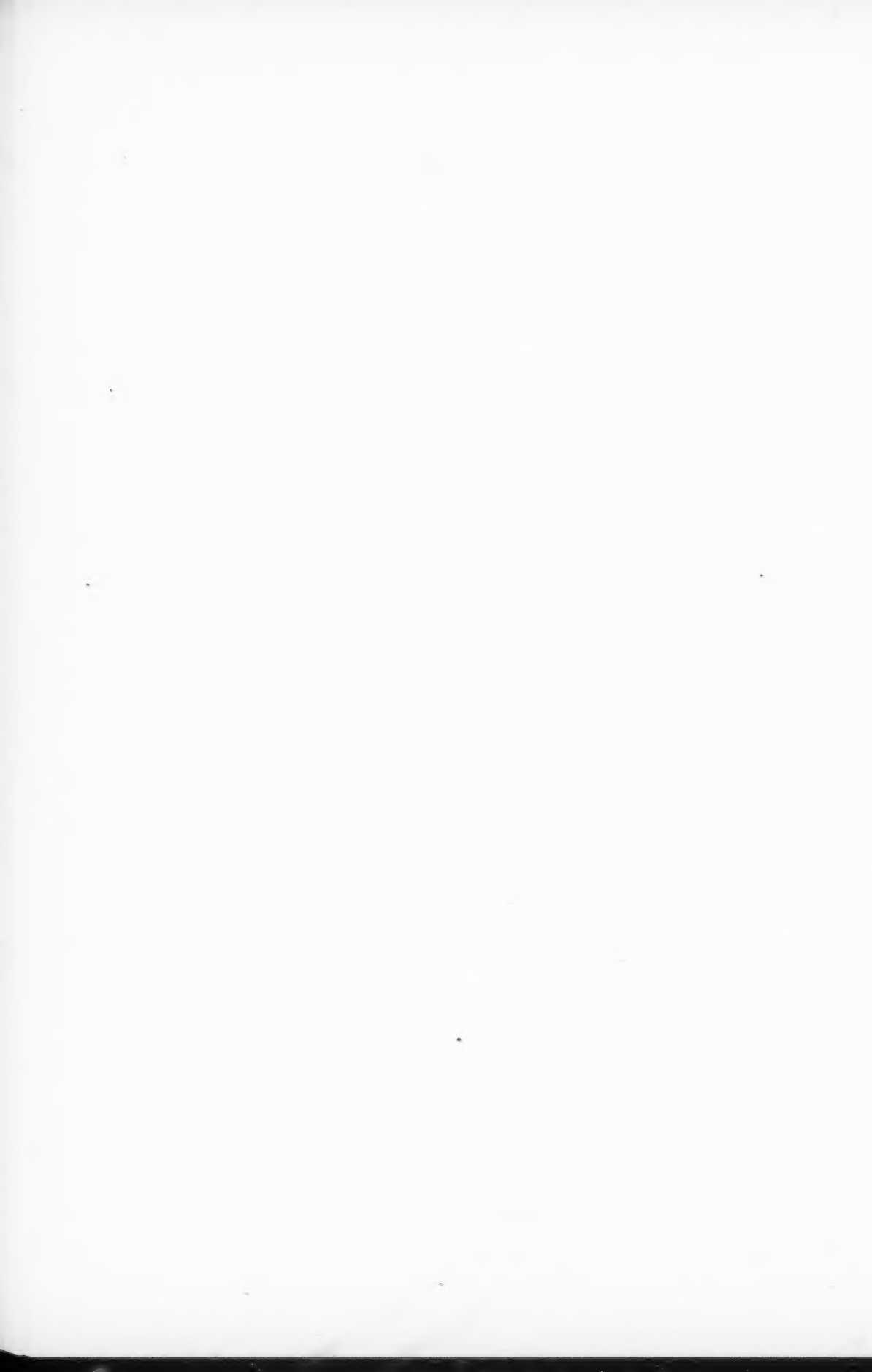
S/Judge Edwin F. Hunter, Jr.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

ISABELLE M. WOODS

No. 89-0859

VERSUS



ANTHONY M. FRANK

JUDGE HUNTER

O R D E R

IN CONSIDERATION OF THE FOREGOING
MOTION TO SUPPLEMENT RECORD:

IT IS ORDERED, ADJUDGED AND DECREED
that the record in the above captioned
matter be supplemented by the addition of
the following two items:

(1) Memorandum in Opposition to
Defendant's Motion for Summary Judgment;

(2) Copy of ruling of Antonio L.
Carbonell, Administrative Law Judge, dated
June 8, 1988.

JUDGMENT RENDERED AND SIGNED on this
12 day of April, 1990.

S/Judge Edwin F. Hunter, Jr.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-4078 Summary Calendar

ISABELLE N. WOODS Plaintiff-Appellant

versus

ANTHONY FRANK Defendant-Appellee



Appeal from the United States District
Court for the Western District Of La.

(August 8, 1990) (CV89-0859)

Before JOHNSON, JOLLY & JONES, Cir. Judges
JOHNSON, Circuit Judge:¹

Isabelle Woods appeals an adverse judgment in this Title VII discrimination action. Finding no error, we affirm.

I. FACTS AND PROCEDURAL HISTORY

In 1986, Isabelle Woods (Woods) was the Manager of Retail Sales and Services at the United States Post Office's Management Sectional Center (MSC) in Shreveport, Louisiana. In July of that year, Woods' supervisor, George DeDual, reassigned Woods to the position of Manager of Station and Branch Operations at the Cedar Grove Station in Shreveport. Woods' new position carried with it the same salary and benefits as her old position although her new job duties were relative to a delivery function.² A month later, in August, 1986, Woods' old position was filled by Michael C. Smith (Smith).



Sometime after Woods was reassigned, her old position which had been filled by Smith was eliminated pursuant to a nationwide restructuring of Postal Service MSC's initiated by the Deputy Postmaster General of the United States. Because the mandate to eliminate Woods' former position came from the Postmaster General's office and affected all MSC's across the country, the management of the Shreveport MSC had no discretion over whether Woods' old position would be retained. Also as a result of the nationwide MSC restructuring, several new positions were created in the Shreveport area. One of those positions was that of Director of Marketing -- a position for which both Smith and Woods applied. After interviews were completed, Smith was ranked number two by the selection committee. Smith ultimately wound up in the position after the number one choice, Douglas Ruth, accepted another job.

Thereafter, Woods filed a formal



administrative complaint in which she alleged that her reassignment in July, 1986, from Manager, Retail Sales and Services to Manager, Station and Branch Operations, was a result of discrimination against her on account of her race, sex and national origin. An Equal Opportunity Commission (EEOC) ALJ conducted a hearing and recommended a finding of discrimination. The Postal Service, however, in its final agency decision on Woods' complaint, rejected the ALJ's finding. Woods appealed the Postal Service's final agency decision to the EEOC Office of Reviews and Appeals. The Postal Service's final agency decision of no discrimination was upheld by the EEOC.

Thereafter, Woods filed this Title VII action in the district court again complaining of the lateral transfer which occurred in July, 1986. Woods requested reassignment to her former position and the award of any salary increases or fringe



benefits which she may have lost as a result of the transfer. The Postmaster General moved for summary judgment alleging that Woods had suffered no loss of salary, position grade level or salary step within a grade level³ and no loss of fringe benefits occasioned by the lateral transfer complained of. The district court granted the motion for summary judgment in favor of the Postmaster General concluding that Woods had suffered no injury as a result of the lateral transfer and that Woods had no available remedy as her prior position had been abolished in an unrelated action. With respect to Woods' allegations that she had not been promoted because of discrimination, the district court found that Woods had not filed the requisite administrative complaint regarding the denial of the position which she sought. Additionally, the district court concluded that the Postmaster General had articulated legitimate nondiscriminatory reasons for



the lateral transfer -- to give Woods desirable experience in a different area and to meet the needs of the Postal Service for a competent manager in the position to which Woods was transferred.

After the district court entered final judgment dismissing Woods' complaint, Woods perfected the instant appeal.

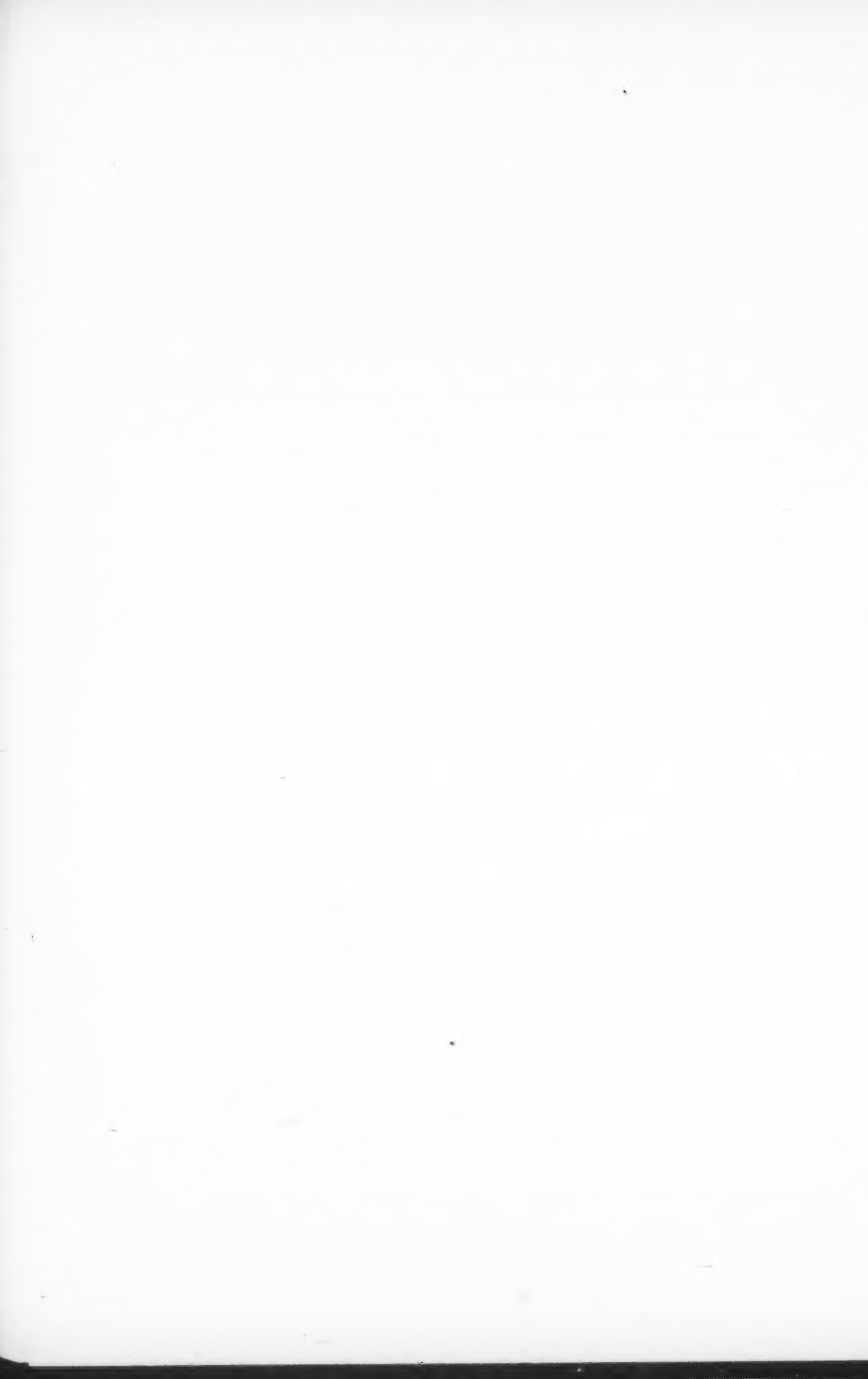
II. DISCUSSION

This Court has held that the standard by which a district court determines the nature and extent of relief which may be awarded in a Title VII action is based on the principle that the "purposes of Title VII are to achieve equality of employment opportunity and to make persons whole for injuries suffered on account of unlawful employment discrimination." Floca v. Homcare Health Services, Inc., 845 F.2d 108, 111 (5th Cir., 1988)(citation omitted). Further, it is axiomatic that only equitable relief, the object of which is to restore the victim of discrimination



to the position he or she would have been in but for the discrimination, is available under Title VII. See 42 U.S.C. § 2000e-5(g). On appeal, Woods argues that the district court should have awarded equitable relief in the nature of a position similar to the one Woods was transferred from, an injunction enjoining the Post Office from engaging in improper employment practices, and front pay.

Article III of the Constitution requires that a suit be dismissed as moot unless it involves "a real and substantial controversy admitting of specific relief." Aetna Life Ins. Co. v. Haworth, 57 S. Ct. 461, 464 (1937). When a federal court is unable to grant any effective and suitable remedy, there is no case or controversy within the meaning of Article III. See DeFunis v. Odegaard, 94 S. Ct. 1704 (1974). In the instant case, because Woods' previous position had been abolished in an administrative action initiated by the



Postmaster General and implemented nationwide, the district court simply could not have provided Woods with the remedy of reinstatement. With respect to Woods' contention that she should have been given a position similar to the one from which she was transferred, we find Woods' argument perplexing. Her new position was similar to the position from which she was transferred -- the new position carried the same salary, status and fringe benefits as did the old position. Thus, Woods already enjoyed the relief which she sought.

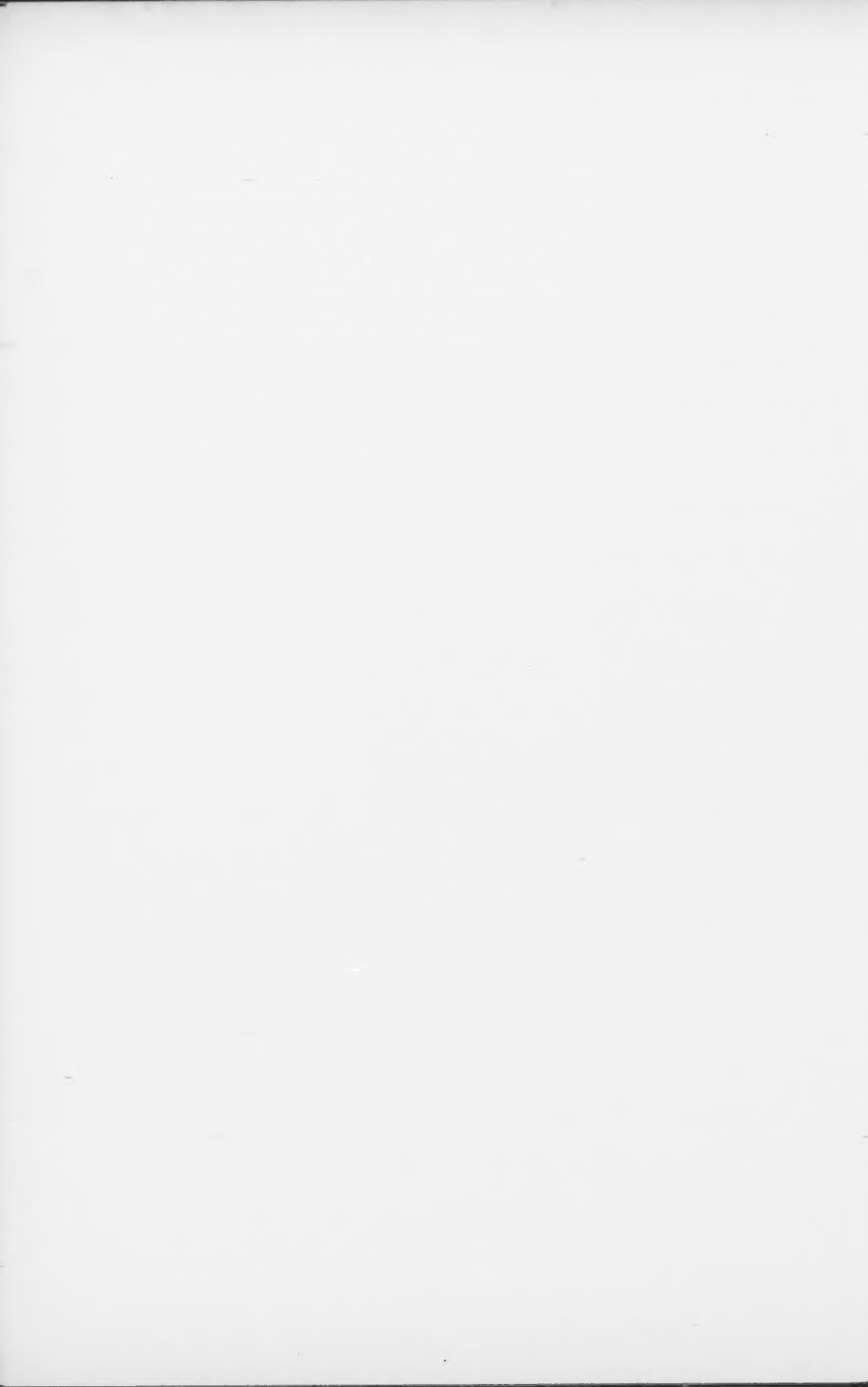
Nevertheless, Woods argues that the district court should have enjoined the Postal Service from "engaging in such employment practice"⁴ and that the district court should have awarded her front pay. In order to prevail on the issue of an injunction, Woods would need to show that she would be subjected to unfair employment practices; it is not sufficient for Woods to merely speculate that she



would be the object of such practices. See Gladden v. Roach, 864 F.2d 1196, (5th Cir.), cert. denied, 109 S. Ct. 3192 (1989). On this record, we are not prepared to conclude that Woods had made the requisite showing under Gladden and consequently we are unable to view the district court's failure to grant injunctive relief as error. Similarly, we do not view the district court's failure to award front pay to Woods as error. It is undisputed that Woods lost no income as a result of her reassignment. Even if Woods had been left in her original position, her pay would have been the same, no more and no less, as her pay in the position to which she was reassigned. Accordingly, the district court did not err in not awarding front pay to Woods.

III. CONCLUSION

Because Woods has failed to show any equitable relief to which she is entitled, the district court did not err in granting

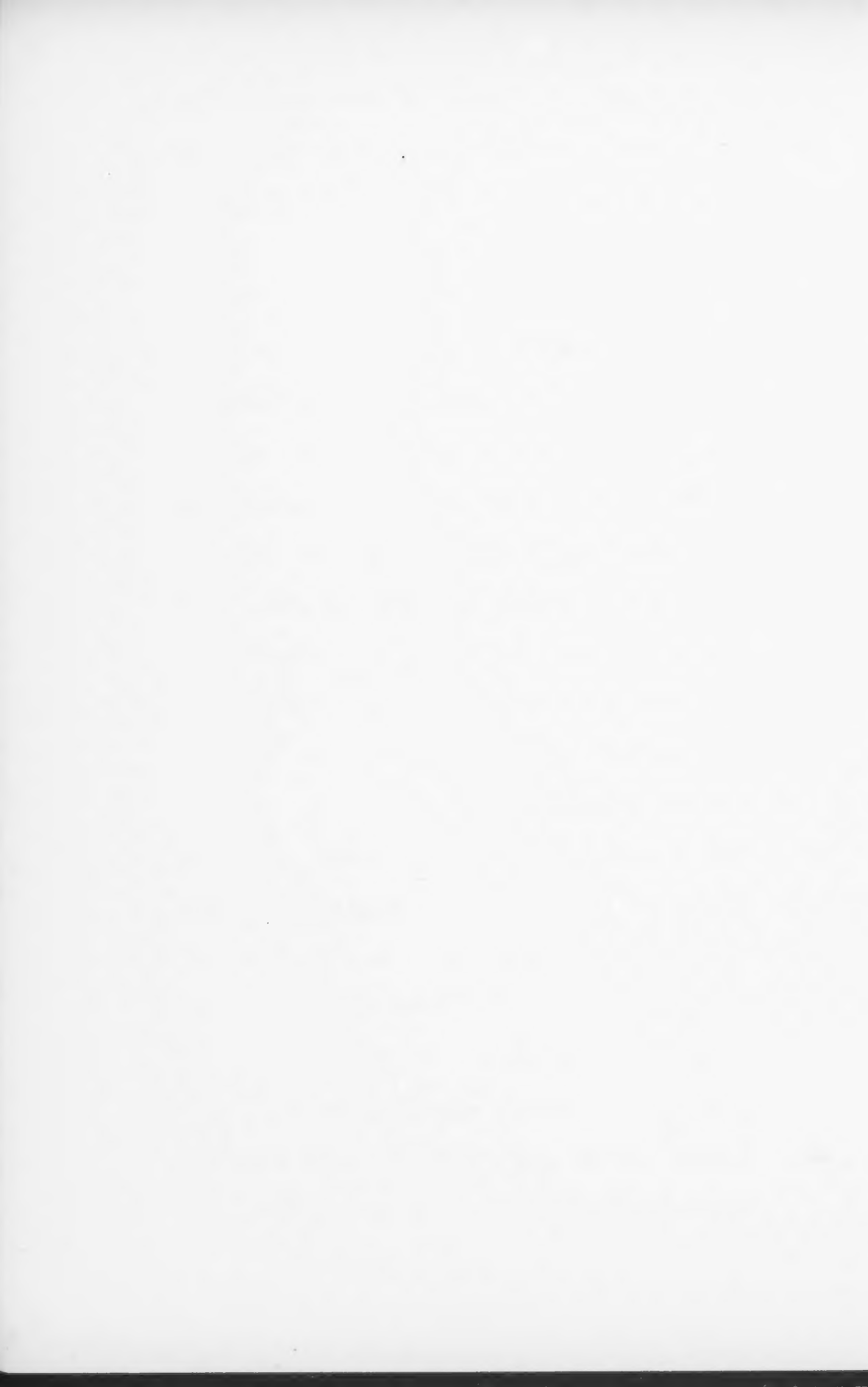


summary judgment in favor of the Postmaster General. The judgment of the district court is affirmed.

AFFIRMED.

FOOTNOTES:

1. Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.
2. The Postmaster General contends that such diversity of experience was "highly desirable, if not requisite" for promotion to the position of Director, Customer Services -- a position to which Woods aspired.
3. Woods grade and step were the same in both positions -- level 18, step 9.



4. We assume that the practice to which Woods refers is involuntary reassignment. Section 353.2 of the Postal Service Employee and Labor Relations Manual, however, provides for such reassignments where the transferred employee suffers no loss of grade. In the instant case, the Postal Service complied with the requirements of § 353.2 in that Woods kept her same grade and step in her new management position.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-4078

ISABELLE N. WOODS Plaintiff-Appellant
versus

ANTHONY FRANK Defendant-Appellee

Appeal from the United States District
Court for the Western District of La.

ON PETITION FOR REHEARING

(September 6, 1990)

Before JOHNSON, JOLLY & JONES, Cir. Judges



PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

S/Sam Johnson, U. S. Circuit Judge

(2)
No. 90-1012

Supreme Court, U.S.

FILED

FEB 21 1991

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

ISABELLE M. WOODS, PETITIONER

v.

ANTHONY M. FRANK, POSTMASTER GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

**BRIEF FOR THE RESPONDENT
IN OPPOSITION**

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MARLEIGH D. DOVER
CATHERINE L. FISK
Attorneys

*Department of Justice
Washington, D.C. 20530
(202) 514-2217*

QUESTION PRESENTED

Whether the court of appeals erred in upholding the district court's grant of summary judgment against petitioner on her claim of discrimination on the ground that she failed to show any equitable relief to which she was entitled.



TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	i
Statement	2
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

<i>Aetna Life Insurance Co. v. Haworth</i> , 300 U.S. 227 (1937)	4
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	7
<i>Bennett v. Corroon & Black Corp.</i> , 845 F.2d 104 (5th Cir. 1988), cert. denied, 489 U.S. 1020 (1989)	4-5, 5-6
<i>Boddy v. Dean</i> , 821 F.2d 346 (6th Cir. 1987) ...	6
<i>City of Los Angeles v. Lyons</i> , 461 U.S. 95 (1983)	5
<i>DeFunis v. Odegaard</i> , 416 U.S. 312 (1974)	4
<i>Doe v. Marshall</i> , 622 F.2d 118 (5th Cir. 1980), cert. denied, 451 U.S. 993 (1981)	4
<i>Gladden v. Roach</i> , 864 F.2d 1196 (5th Cir.), cert. denied, 109 S. Ct. 3192 (1989)	5
<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986)	7
<i>Miller v. Texas State Board of Barber Examiners</i> , 615 F.2d 650 (5th Cir.), cert. denied, 449 U.S. 891 (1980)	5, 6
<i>Rogers v. Scurr</i> , 676 F.2d 1211 (8th Cir. 1982)	5
<i>Swanson v. Elmhurst Chrysler Plymouth, Inc.</i> , 882 F.2d 1235 (7th Cir. 1989), cert. denied, 110 S. Ct. 758 (1990)	6

IV

Cases — Continued:	Page
<i>United States v. (Under Seal)</i> , 757 F.2d 600 (4th Cir. 1985)	4, 6
<i>United States Postal Serv. Board of Governors v. Aikens</i> , 460 U.S. 711 (1983)	7
Constitution, statutes, and regulation:	
U.S. Const. Art. III	4, 6
Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e <i>et seq.</i> :	
42 U.S.C. 2000e-5(g)	4
42 U.S.C. 2000e-16(d)	4
29 C.F.R. 1613.221	2
Miscellaneous:	
<i>U.S. Postal Service Employee & Labor Relations Manual</i> , Issue 4 (Aug. 29, 1980)	2

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1012

ISABELLE M. WOODS, PETITIONER

v.

ANTHONY M. FRANK, POSTMASTER GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 29-39) is unreported, but the decision is noted at 911 F.2d 728 (Table). The opinion of the district court (Pet. App. 17-27) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1990, and a petition for rehearing was denied on September 6, 1990. Pet. App. 39-40. The petition for a writ of certiorari was filed on December 4, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In July 1986, petitioner, a black woman of Puerto Rican origin, was reassigned by her supervisor from her position as Manager of Retail Sales and Services at the Shreveport, Louisiana Management Sectional Center (MSC) of the United States Postal Service to the position of Manager of Station and Branch Operations at the Cedar Grove Station in Shreveport. Petitioner retained the same grade (level 18), salary step within grade (step 9), annual salary (\$39,803 at the time of transfer), and all other employment benefits that she enjoyed before the transfer. Pet. App. 19. Her reassignment was authorized by Section 353.2 of the Postal Service Employee and Labor Relations Manual, which permits "the permanent assignment, with or without relocation, of an employee," without his consent, "to another established position with the same grade in the same schedule" or "to a position with an equivalent grade in another schedule." After reassigning petitioner, her supervisor promoted Michael Smith, a white male, to petitioner's former position.

Petitioner filed an administrative complaint alleging that her transfer constituted discriminatory treatment based on her race, sex, and national origin. After a hearing, the Equal Employment Opportunity Commission (EEOC) administrative law judge (ALJ) recommended a finding of discrimination. Pet. 5-9. The Postal Service, which was not bound by the ALJ's findings or recommended decision, see 29 C.F.R. 1613.221, made a subsequent determination that her transfer was not discriminatory. Pet. App. 32. The EEOC Office of Review and Appeals upheld the Postal Service's determination, finding that the Postal Service had established legitimate nondiscriminatory reasons for reassigning petitioner, namely, to give her desirable experience in a position involving delivery of mail, and to fill a vacant man-

agerial position with an experienced, permanent manager. *Id.* at 26.

In January 1988, the Deputy Postmaster General eliminated petitioner's former position (then held by Smith) in all MSC facilities as part of a nationwide restructuring of the Postal Service. In the reorganization, the Postal Service created a grade level 21 position with the title MSC Director, Marketing. Both petitioner and Smith applied for the job, and both were interviewed. Smith ultimately was offered the position. Pet. App. 19-20.

Petitioner did not file an administrative complaint challenging the Postal Service's decision to promote Smith to the MSC Director, Marketing position. Pet. App. 20. Instead, she filed a complaint in the United States District Court for the Western District of Louisiana alleging that the Postal Service discriminated against her in reassigning her and in passing her over for promotion.

2. In an unpublished order, the district court granted summary judgment in favor of respondent. Pet. App. 17-27. The court held that petitioner had failed to establish that the Postal Service's reasons for transferring her were pretextual. *Id.* at 26. In any event, the court concluded, petitioner's discrimination claim was moot because there was no appropriate remedy available under Title VII. *Id.* at 23. Finally, the court dismissed the claim challenging the Postal Service's failure to select her for the MSC Director, Marketing position on the ground that she had not exhausted her administrative remedies. *Id.* at 25.

3. The Fifth Circuit affirmed in an unpublished order, holding that petitioner "had failed to show any equitable relief to which she is entitled." Pet. App. 37. The court noted that the elimination of petitioner's former job prevented her from being reinstated and that there was no need to award her an equivalent position because her current job was identical in pay and benefits and similar in responsibility to the

one from which she had been transferred. The court also concluded that she was not entitled to injunctive relief barring any future discriminatory actions because she had neither alleged nor proved that future discrimination was likely to occur. Nor was she entitled to back or front pay, since she had suffered no loss in pay, benefits, or rank. *Id.* at 36-37.

ARGUMENT

The court of appeals correctly applied settled law to the facts of this case. Its decision is not in conflict with the decisions of this or any other court. Further review is therefore not warranted.

1. Article III of the Constitution permits courts to resolve only "real and substantial controvers[ies] admitting of specific relief." *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-241 (1937). Where a court is unable to grant any "effective and suitable remedy," *United States v. (Under Seal)*, 757 F.2d 600, 603 (4th Cir. 1985), or where supervening events obviate the need for, or the possibility of, relief, there is no case or controversy for the court to resolve. See *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974); *Doe v. Marshall*, 622 F.2d 118 (5th Cir. 1980), cert. denied, 451 U.S. 993 (1981).

The court of appeals below correctly concluded that there was no remedy available to petitioner under Title VII for the alleged discriminatory transfer. If an employee has been the victim of employment discrimination, Title VII authorizes courts to order "reinstatement or hiring * * * with or without back pay * * * or any other equitable relief as the court deems appropriate." 42 U.S.C. 2000e-5(g). See 42 U.S.C. 2000e-16(d). On the basis of this language, the courts have concluded that "[o]nly equitable relief is available under Title VII." *Bennett v. Corroon & Black Corp.*, 845

F.2d 104, 106 (5th Cir. 1988), cert. denied, 489 U.S. 1020 (1989); see also *Miller v. Texas State Board of Barber Examiners*, 615 F.2d 650, 654-655 (5th Cir.), cert. denied, 449 U.S. 891 (1980). However, there is no appropriate equitable relief in this case. It is undisputed that petitioner's transfer to the position of manager of the Cedar Grove Station resulted in no loss of salary, grade level, or other job benefits. It is not possible to reinstate petitioner in her former position because that job was eliminated following her transfer; nor will petitioner benefit from the offer of another, similar position, since her current job is equivalent in all important respects to the one from which she was transferred. Finally, petitioner is not entitled to an injunction. Before an injunction may issue, "the court must determine that a cognizable danger of future violations exists and that danger must be more than a mere possibility." *Rogers v. Scurr*, 676 F.2d 1211, 1214 (8th Cir. 1982). "One seeking injunctive relief must demonstrate a real and immediate threat that he will be subject to behavior which he seeks to enjoin. It is not sufficient for the plaintiff to speculate that he will be subject to injurious conduct." *Gladden v. Roach*, 864 F.2d 1196, 1198 (5th Cir.), cert. denied, 109 S. Ct. 3192 (1989), citing *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). As the court of appeals recognized, petitioner fell far short of meeting this standard, since she failed either to allege or prove that there was a "real and immediate" threat that the Postal Service would discriminate against her in the future.¹ In sum, petitioner received all of the relief to which she could conceivably be entitled;

¹ The gravamen of petitioner's complaint appears to be that her transfer to the Cedar Grove position deprived her of the opportunity to function in a job that she presumably enjoyed. However, compensation in the form of nominal, compensatory, or punitive damages is a legal remedy unavailable under Title VII. See, e.g., *Bennett v.*

there was no further remedy available to her under by Title VII. Under these circumstances, the court of appeals was correct to uphold the grant of summary judgment in favor of respondent. That decision does not merit further review.²

2. The merits of petitioner's allegations of discrimination are irrelevant to the court of appeals decision, which did not address the district court's alternative basis for summary judgment — that petitioner failed to “present a material issue of fact to establish a *prima facie* case of * * * discrimination.” Pet. App. 26. However, that finding, which provides another valid basis for the ultimate disposition of this case, does not warrant further review by this Court.

Claiming that “this [was] not a matter suitable for summary judgment” (Pet. 11), petitioner requests review of the district court's conclusion that there was no disputed issue of material fact as to discrimination. See Pet. App. 26. According to petitioner, summary judgment is appropriate “only when [the] mover is entitled to relief beyond all

Corroon & Black Corp., 845 F.2d at 106; *Miller v. Texas State Board of Barber Examiners*, 615 F.2d at 654-655; *Swanson v. Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235, 1240 (7th Cir. 1989), cert. denied, 110 S.Ct. 758 (1990); *Boddy v. Dean*, 821 F.2d 346, 352 (6th Cir. 1987).

² Here, the court of appeals decided that petitioner was not entitled to any relief for alleged discrimination, regardless of whether her allegations have merit. In determining that her claim was therefore “moot,” the court of appeals recognized that it makes no difference whether, strictly speaking, there is no “controversy” in the Article III sense, or whether, instead, the resolution of a case can have no remedial consequences. In either instance, the result is the same: there is no point in judicial resolution of the issues. See *United States v. (Under Seal)*, 757 F.2d at 603 (“Passing the possibly difficult conceptual question of whether the appeal has been mooted in constitutional case or controversy terms, we conclude that, in any event, we should treat it as moot for prudential reasons.”).

doubt." Pet. 10. That, however, is not the standard. Rather, the party bearing the burden of proof can defeat a motion for summary judgment only by presenting "evidence on which the [trier of fact] could reasonably find" in his favor.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-252 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

In granting summary judgment for respondent, the district court justifiably concluded that petitioner, who bore the burden of proving discrimination, see *United States Postal Serv. Board of Governors v. Aikens*, 460 U.S. 711 (1983), failed to meet this standard. The Postal Service established before the court that petitioner's lateral transfer without loss of salary or job benefits was authorized by a regulation that granted the Service discretionary authority to make such transfers. The Postal Service further established that petitioner's transfer was made for the benefit of the Service and that it served legitimate business goals. Petitioner failed to submit to the district court any statements or affidavits disputing these facts, choosing, instead, to rely exclusively on the ALJ's proposed findings and recommended decision. See Gov't C.A. Br. 22. The ALJ's decision, however, did not constitute evidence of discrimination by the Postal Service. Nor was the decision binding on either the Postal Service or the district court. The district court was therefore correct to conclude that the legitimate business reasons advanced by the Postal Service for petitioner's transfer were essentially un rebutted.

But even if petitioner had properly admitted into evidence before the district court the hearing testimony that was the basis of the ALJ's decision, there would still be no warrant for review of the decision to grant summary judgment. There is no indication that, to the extent the district court appears to have considered this evidence, it applied the wrong legal standard for summary judgment. Rather, it is

apparent that the district court, in conducting *de novo* review, found insufficient evidence of pretext to support a judgment in petitioner's favor. See Pet. App. 26. The district court's determination is not clearly erroneous, and does not merit review by this Court. In any event, the district court's assessment of the evidence of discrimination was irrelevant to the decision of the court of appeals, which did not address the merits of the discrimination claim. For this reason as well, the case does not merit further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MARLEIGH D. DOVER
CATHERINE L. FISK
Attorneys

FEBRUARY 1991